

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Satellite CD Radio, Inc.)	File Nos. 71-SAT-AMEND-97
)	49/11-DSS-P-93
Application for Authority to Construct, Launch,)	26/27-DSS-LA-93
and Operate Two Satellites in the Satellite Digital)	83/84-SAT-AMEND-95
Audio Radio Service)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 2001

Released: November 30, 2001

By the Commission:

I. INTRODUCTION

1. By this Order, we deny the Application for Review filed by Primosphere Limited Partnership ("Primosphere")¹ and affirm a decision by the International Bureau ("Bureau") giving Satellite CD Radio ("CD Radio")² authority to construct, launch, and operate two satellites in the Satellite Digital Audio Radio Service ("SDARS"). This will allow CD Radio to continue with its implementation of service to consumers.

II. BACKGROUND

2. On March 3, 1997, the Commission adopted rules to auction two 12.5 megahertz SDARS authorizations in the S band.³ CD Radio submitted one of two winning bids in the auction and the Commission awarded it a license to launch and operate an SDARS system.⁴ On October 10, 1997, the

¹ Primosphere Application for Review, filed November 10, 1997 ("Primosphere Application").

² CD Radio subsequently changed its name to Sirius Satellite Radio, Inc. For purposes of this Order we will refer to the licensee as CD Radio.

³ The S band consists of the 2310-2360 MHz frequency bands. *See also Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-91, 12 FCC Rcd 5754 (1997) ("SDARS Order").

⁴ CD Radio filed its original application on May 18, 1990, amended the application on September 14, 1992, and updated that amendment after the auction on May 16, 1997 to reflect changes made in order to conform to newly adopted service rules. *See Satellite CD Radio, Inc., Application for Authority to Construct, Launch, and Operate a*

Bureau authorized CD Radio to launch and operate an SDARS system and denied Primosphere's Petition to Deny CD Radio's application.⁵ In granting CD Radio's license and addressing Primosphere's Petition to Deny, the International Bureau held that the statutory foreign ownership restrictions in Section 310(b) of the Communications Act⁶ do not apply to a subscription-based SDARS service like that proposed by CD Radio.⁷ The Bureau relied on its previous decision regarding subscription Direct Broadcast Satellite (DBS) service in the *MCI* case which, at the time the license was granted, was subject to an Application for Review by the Commission.⁸ Furthermore, the Bureau found that even if foreign ownership limits did apply to SDARS, it would be in the public interest to grant CD Radio's license based on a "home markets" analysis.⁹ Primosphere contends that the Bureau erred in granting the SDARS license to CD Radio and raises essentially the same arguments that it made in its Petition to Deny. CD Radio filed an Opposition to Primosphere's Application and Primosphere filed a Reply.¹⁰

III. DISCUSSION

A. Foreign Ownership

3. *Subscription Video Decision.* Primosphere argues that the Bureau erred in its application of the 1987 *Subscription Video* decision¹¹ when it determined that the foreign ownership restrictions of Section 310(b)(4) of the Communications Act do not apply to SDARS. Primosphere further argues that

Two Satellites in the Satellite digital Audio Radio Service, Order and Authorization, 13 FCC Rcd 7971, 7973 (Int'l Bur. 1997) ("*CD Radio License Order*").

⁵ See *id.*

⁶ 47 U.S.C. § 310(b) states:

"No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

- (1) any alien or the representative of any alien;
- (2) any corporation organized under the laws of any foreign government;
- (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representatives thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."

⁷ *CD Radio License Order*, 13 FCC Rcd 7971, 7979-80, ¶¶ 17, 19.

⁸ *MCI Telecommunications Corporation*, 11 FCC Rcd 16275 (Int'l Bur. 1996) ("*Bureau Order*"), *aff'd*, 14 FCC Rcd 11077 (1999)

⁹ See *CD Radio License Order*, 13 FCC Rcd at 7981-85, ¶¶ 22-29.

¹⁰ CD Radio Opposition to Application for Review, filed November 25, 1997; Primosphere Reply to CD Radio Opposition, filed December 5, 1997.

¹¹ *In the Matter of Subscription Video*, 2 FCC Rcd 1001.

the Commission should revisit the *Subscription Video* decision, either through the ongoing review of the *MCI* decision or in a new proceeding. Primosphere asserts that the Commission should hold in abeyance any licensing action that would permit multi-channel audio or video transmission to a mass audience without holding the providers of these services to the same strict scrutiny and standards as those imposed on broadcast station licensees.¹² Subsequently, in the *MCI* case, the Commission did revisit *Subscription Video* and stated the following:

Although the Commission did not specifically mention Section 310(b) in *Subscription Video*, it determined in that Order that subscription video is not “broadcasting” as that term is used in the Communications Act. It clearly follows from the determination that subscription video service is not broadcasting, as defined in the Communications Act, that Section 310(b)’s restrictions on foreign ownership of broadcast licensees do not govern eligibility to provide subscription video service.¹³

4. We agree with Primosphere that the issues regarding foreign ownership for DBS and SDARS are virtually identical¹⁴ and thus we affirm the Bureau’s determination that Section 310(b) of the Communications Act does not apply to subscription SDARS licenses because the service offered is neither broadcast, common carrier, aeronautical en route or aeronautical fixed service.¹⁵

5. Because foreign ownership limits do not apply to CD Radio’s license, several other arguments raised by Primosphere in its Application for Review are moot. In CD Radio’s license order the Bureau made an alternative finding that even if Section 310(b) applied to this license, it would not be in the public interest to deny the application.¹⁶ Because we are affirming the Bureau’s determination that Section 310(b) does not apply, we will not reach or address the issues regarding the Bureau’s alternative finding.

6. Next, Primosphere questions the Bureau’s assertion that an SDARS licensee would have to obtain approval to change its regulatory classification.¹⁷ Primosphere argues that an SDARS licensee could apply to provide subscription service and after obtaining a license could change to a broadcast service and thus avoid stricter scrutiny of its application.¹⁸ The Commission’s rules, however, require

¹² Primosphere Application at pp.5-6.

¹³ *MCI Telecommunications Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 11077, 11082 (1999) (“*MCI Order*”) at ¶12.

¹⁴ See *CD Radio License Order*, 13 FCC Rcd at 7977, ¶ 13, citing Primosphere’s Reply to Opposition of its Petition to Deny at 2.

¹⁵ See 47 U.S.C. § 310(b).

¹⁶ See *CD Radio License Order*, 13 FCC Rcd at 7981-85, ¶¶ 22-29.

¹⁷ *Id.* at p. 6.

¹⁸ *Id.*

that a licensee seeking to modify its authorization must request prior authority from the Commission, and thus the Bureau was correct in finding that a change in classification would require approval.¹⁹

7. *Ownership interests and character issues.* Primosphere makes extensive arguments about the ownership interests of Robert and Diane Friedland.²⁰ These are essentially the same arguments it made to the Bureau in a supplemental filing to its petition to deny CD Radio's license that were rejected by the Bureau. We affirm the Bureau's conclusions. Primosphere contends, *inter alia*, that Robert Friedland may be a Canadian citizen holding 19 percent of CD Radio's stock; that his wife Darlene Friedland may have transferred her stock in CD Radio to Mr. Margolese, a Canadian citizen, under terms of a voting trust agreement that Robert Friedland consented to; and that Robert Friedland is alleged to have left the United States. It further contends that if all of these allegations are true, CD Radio would have over 50 percent foreign ownership. Primosphere also questions Robert Friedland's character, *e.g.*, that he is the subject of "federal and state civil proceedings alleging his personal responsibility for one of this nation's most significant environmental disasters," but submits no documentation or affidavits to support this allegation.²¹ To the extent that Primosphere's contentions are related to foreign ownership issues, in light of our decision above that SDARS is not subject to Section 310(b) of the Communications Act, we find that Primosphere's contentions are irrelevant to CD Radio's license authority. To the extent that Primosphere raises character issues, we agree with the Bureau's conclusion that these arguments do not warrant further scrutiny as they are unsupported by affidavits that would allow us to assess their authenticity or relevance to this proceeding.²²

IV. CONCLUSION

8. Primosphere presents no sound arguments regarding the Bureau's grant of CD Radio's authorization and its Application for Review is denied. We therefore affirm the Bureau's Order of October 10, 1997 granting CD Radio's authorization.

¹⁹ 47 CFR § 25.117. Cf. 47 CFR § 25.118, which allows a change from private carrier to common carrier without prior application but requires subsequent prompt notification. A change from private carriage, i.e. subscription, to classification as a broadcaster would thus require prior application and Commission approval.

²⁰ *Id.* at pp.10-15.

²¹ Primosphere Application at 11.

²² See 47 U.S.C. § 309(d)(1), that requires the protesting party to submit a petition containing specific allegations of fact (supported by affidavit of a person ... with personal knowledge thereof) sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity] See also *Serafyn V. F.C.C.*, 149 F.3d 1213, 1216 (D.C. Cir. 1998).

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Primosphere Limited Partnership's November 10, 1997 Application for Review of the International Bureau's *Order* of October 10, 1997 that granted CD Radio Corporation's authorization to operate two satellites in the Satellite Digital Radio Service, *Order and Authorization*, DA 97-2191, 13 FCC Rcd 7971 (Int'l Bur. 1997), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary